SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

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October Term, 1969
No. 347

DAVID G. CAIN, *et al.*,

Appellants,

vs.

COMMONWEALTH OF KENTUCKY,

Appellee.

On Appeal From the Court of Appeals of Kentucky.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner, Commonwealth of Kentucky, prays that a rehearing be granted of this Court's decision of March 23, 1970, reversing the judgment of the Jefferson Circuit Court of Jefferson County in the above-entitled case, and that the case be ordered restored to the docket for argument at the next term of Court on the first question presented in the Jurisdictional Statement:

> "Is Kentucky's criminal statute dealing with obscene matter under which appellants were convicted violative of the First and Fourteenth Amendments of the Constitution of the United States?"

The issues which arise out of an application of the Kentucky obscenity statute to the motion picture film

"I A Woman", are common to those presently under consideration by this Court in *Grove Press Inc. v. Maryland State Board of Censors*, October Term, 1969, No. 905, jurisdiction noted March 23, 1970 and *Batchelor v. Stein*, October Term, 1969, No. 565, jurisdiction noted Dec. 8, 1969. We understand that those cases will not be set for argument until the October 1970 Term, and therefore request that this Court revoke its previous ruling and place the matter on the summary calendar for argument following No. 905.

REASONS FOR GRANTING REHEARING AND RESTORING CASE TO DOCKET FOR ARGUMENT ON QUESTION 1.

I.

The Court Is Risking Embarrassment by Failing to Focus "Searchingly" on the Obscenity Vel Non Issue. Briefing and Oral Argument on That Issue Is, at the Very Least, "Insurance" That the Court Will Not Blunder.

In *Cain*, this Court, without benefit of briefing or argument on the merits, granted the appeal and reversed a unanimous judgment of the Court of Appeals of Kentucky which had held that the film "I A Woman" was obscene under the laws of the State of Kentucky. In our view this Court has unnecessarily placed itself at a disadvantage in the resolution of this critical problem of obscenity in motion picture films—a problem which is presently facing governments in every state in the union.

In support of this contention we point out that on the same date that it decided *Cain*, this Court also noted jurisdiction in *Grove Press Inc. v. Maryland State Board of Censors*, October Term, 1969, No. 905, which

case focused on the same issue raised in *Cain i.e.*, the power of the States of Maryland under its obscenity law to deal with motion picture films—in that case the motion picture film, "I Am Curious (Yellow)". We submit that fairness requires that the Attorney General of Kentucky be permitted the same opportunity as the Attorney General of Maryland to lend advocacy in support of the position taken by the judiciary in his state which, unlike the result in Maryland, was a unanimous one.

In failing to call for briefs in *Cain* on the obscenity *vel non* issue, this Court has unnecessarily cut off the flow of vital information and adversary contention. Time and again, this Court has, in a different context, mandated that the judicial body must "focus searchingly on the question of obscenity." *Lee Arts Theater Inc. v. Virginia*, 392 U.S. 636, 638, 20 L. Ed. 2d 1313, 1315, 88 S. Ct. 2103 (June 17, 1968), citing *Marcus v. Search Warrants*, 367 U.S. 717, 731-732, 6 L. Ed. 2d 1127, 1135, 1136, 81 S. Ct. 1708 and *Friedman v. Maryland*, 380 U.S. 51, 58-59, 14 L. Ed. 2d 649, 654, 655, 85 S. Ct. 734. We submit that the interests of the state require no lesser treatment.

It appears from the cursory treatment accorded the subject matter, that this Court's inquiry into the merits of "I A Woman" must have been superficial. We submit that the Court will find it impossible to justify a rule of law which prohibits fornication in public as against public policy, but requires, as a constitutional right, that it be subject to being photographed as an incident to entertainment, magnified by enlargement, on the screen, attractively illustrated with graphic sound and music, and exhibited to a live paying audience. Com-

pare *Trans Lux Dist. Corp. v. oard of Regents,* 14 N.Y. 2d 88, 248 N.Y.S. 2d 857, reversed on other grounds in 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 950. If this is permissible, why not a live performance in public to a consenting paying audience?

This Court should searchingly explore to see whether this film was really exhibited as an "honest artistic expression" or "created and exploited entirely on the basis of its appeal to prurient interests". *Ginzburg v. U.S.*, 383 U.S. 463, 474, 16 L. Ed. 2d 31, 40, 86 S. Ct. 942. An examination of the "trailers" offered to the public would, in our opinion establish that the film was "exploited" as "graphic matter openly advertised to appeal to the erotic interest of their customers," which *Ginzburg* teaches us is pandering 383 U.S. 463. His Court had originally considered examining a copy of the film supported by Audubon Films. A searching examination should also require the submission of a copy of the "previews" which were used to advertise the film. The previews are also available from the Westchester County District Attorney in White Plains, New York whose judgment was that there was probable cause to authorize the issuance of a search warrant and who seized the previews under a search warrant. *People of the State of New York v. Steinberg,* 304 N.Y.S. 2d 858 at 861.

We submit that this Court cannot and should not shut its eyes to these and other events which are occurring outside the Courtroom. Respondent should be permitted to lay before this Court, and document through narrative, the case history and opposition to "I A Woman" in other states. This court should recognize that "I A Woman" is not just another lewd

film. It was one of the first major attempts to move the skid row skin flick into the neighborhood theater. See, for example, *Metzger v. Pearcy*, 393 F. 2d 202 (Apr. 29, 1968). *Metzger v. Illinois* and the federal district court decision of Judge Abraham L. Marovitz in the Northern District of Illinois No. 67C2194 (June 19, 1968), unreported, the role which "I A Woman" played in the mushrooming development of the sexploitation film and the deleterious effect that its clearance will have on law enforcement efforts to contain obscenity in the films should be permitted to be developed by full briefing on the obscenity *vel non* issue. Certainly this court must recognize that the *Cain* case and "I A Woman" film is just as important as a resolution of the "I Am Curious Yellow" controversy.

II.

This Court's Brief Opinion of March 23, 1970, Reading "Per Curiam, the Judgment Is Reversed. Redrup v. New York, 386 U.S. 767" (Justices Burger and Harlan Dissenting) Sheds No Light on the Constitutional Issues Raised Herein, and Fails to Provide Kentucky Law Enforcement With the Definitive Guideposts Necessary for a Practical Resolution of the Obscenity Problem.

The sole authority cited in support of the reversal herein, *Redrup v. New York*, 386 N.Y. 767, (referred to popularly as the *"Redrup-Austin-Gent"* decision) was itself a brief *per curiam* decision handed down in May of 1967 by a badly divided membership on this Court. Since its inception, the *Redrup-Austin-Gent* decision has come under serious critical attack. See, for example, the analysis of the *Redrup-Austin-Gent* and other compan-

ion rulings appearing as Exhibit 51* in Hearings Before the Committee on the Judiciary United States Senate, Ninetieth Congress, Second Session on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States, pages 1171 *et seq.* See also *Cain v. Commonwealth of Kentucky*, 437 S.W. 2d 769 at 771; *Huffman v. United States*, 250 A. 2d 842 at 844, footnote 3. *Dykema v. Bloss*, 169 N.W. 2d 367 at 372; *State of Florida v. Reese*, 222 So. 2d 732 at 736; *City of Youngstown v. De Loreto*, 254 N.E. 2d 490 at 502; *Wagonheim v. Maryland State Board of Censors*, 258 A. 2d 240, at 252 (concurring opinion of Justice Barnes).

A casual reading of *People of the State of [illegible] v. Virgil Billingsley et al.*, 173 N.W. [illegible] ation of the subject matter [illegible] to make it crystal clear that any benefit [illegible] from *Redrup* is non-existent. Compare also the observations of the Oregon Supreme Court in *State of Oregon v. Childs*, 447 P. 2d 504 (Nov. 20, 1968), certiorari denied in 394 U.S. 931, 22 L. Ed. 2d 460, 89 S. Ct. 1198 (Mar. 24, 1969) with those of Federal District Judge Soloman in *Childs v. State of Oregon*, 300 F. Supp. 649 (June 23, 1969) and the trial judges opinions in *United States v. 4400 Copies of Magazines*, 256 F. Supp. 902 at 903 and *United States v. 77 Cartons of Magazines*, 300 F. Supp. 851 at 853.

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*A 16 mm. motion picture documentary film, 57 min. entitled "A REPORT ON THE UNITED STATES SUPREME COURT AND ITS RECENT DECISIONS ON OBSCENITY CASES" based upon the content of Exhibit 51 was annexed as Appendix "A" to an amicus curiae brief filed by the Citizens for Decent Literature Inc. in the Court of Appeals of Kentucky in the *Cain* case. On Jan. 28, 1969 the Court of Appeals reviewed the film and, on February 14, 1969 handed down its decision.

III.

The Kentucky Court of Appeal's Holding That a State Is Not Barred From Considering the Trier of Fact as the Embodiment of the Community Standards" Deserves a Ruling on Its Merits as Applied to the Motion Picture Film "I, A Woman."

Both *Austin v. Commonwealth of Kentucky* and *Cain v. Commonwealth of Kentucky* (supra, p. 773) were tried to a jury and the obscenity issue resolved by that body. The judicial system in Kentucky unanimously thought it to be obligatory that it was not barred from considering the trier of fact as the embodiment of the community standards. This Court reversed both jury decisions without one word of opinion as to its application in obscenity cases. We urge this Court, to grant a rehearing on the petitions presently so as to consider after briefing and argument the merits of this time honored approach to the problem that "I, A Woman" presents (*United States v. Kennerley*, 209 Fed. 119 (1913); *United States v. One Book Entitled Ulysses*, 5 F. 2d 182, 184; *United States v. One Book Entitled Ulysses*, 72 F. 2d 156, 157, cited in *Roth v. United States*, 354 U.S. 476, 489, n. 26; *People v. Noroff*, 58 Cal. Rptr. 172, 175; *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 903; *Grove Press, Inc. v. Gerstein*, 378 U.S. 577, 586; *Grove Press, Inc. v. Christenberry*, 276 F. Supp. 444, 447; *Grove Press, Inc. v. Christenberry*, 276 F. Supp. 433, 436; Justice Douglas dissenting; *Voldanski v. United States*, 249 F. 2d 840, 844, 845; Justice Stewart writing the opinion; *The Bill of Rights* by Justice Learned Hand, Harvard University Press at page 73.) See also the Petition for Certiorari of the Attorney General of Kentucky in *Austin v. Commw. of Kentucky*, October Term, 1966, No. 16.

Conclusion.

Respondent, in seeking a hearing and argument on the obscenity *vel non* issue, would respectfully point out that the State of Maryland has already been accorded that right in relation to its own obscenity statute and its application to a motion picture film. The Maryland film, in many respects, does not approach the significance of the Kentucky motion picture film. Since the basic issues are already before it, this Court, can only benefit by the further briefing and argument which would result from noting jurisdiction in the "I A Woman" case.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JOHN B. BROWNING,
Assistant Attorney General,
Counsel for Petitioner.